

# BRAZIL

## INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE (IIPA)

### 2023 SPECIAL 301 REPORT ON COPYRIGHT PROTECTION AND ENFORCEMENT

**Special 301 Recommendation:** IIPA recommends that Brazil remain on the Watch List in 2023.<sup>1</sup>

**Executive Summary:** While IIPA members commend Brazil's excellent progress with a number of enforcement actions against online piracy, several long-standing normative and legislative concerns warrant keeping Brazil on the Watch List. For the creative industries, Brazil is a top priority market in Latin America. As such, the country's long overdue adherence to the WIPO Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT) (collectively known as the WIPO Internet Treaties) is a major concern for IIPA members. In 2019, then-President Bolsonaro signed the WPPT and forwarded the document to the National Congress for consideration. To be incorporated into Brazilian law, the WPPT needs to be ratified by the National Congress. In addition, the Government has indicated that the National Congress should do the same in relation to the WCT. It is essential that the Brazilian Congress approves and implements the WIPO Internet Treaties to ensure that the country's legal framework is consistent with global standards.

Brazil continued to provide positive anti-piracy enforcement developments in 2022. For instance, enforcement authorities initiated a fourth wave of Operation 404 that took down online piracy platforms in 11 different Brazilian states through criminal remedies, including site-blocking injunctions, in addition to leading search and seizure raids against major pirate targets. In August 2022, the Tribunal of Justice of the State of São Paulo granted a permanent and dynamic blocking injunction against 21 major stream-ripping services, and in September 2022, the same court granted a dynamic blocking injunction against 40 major stream-ripping services for an initial period of 180 days. Both orders were issued following applications filed by the Brazilian anti-piracy organization APDIF (Brazilian Association for the Protection of Intellectual and Phonographic Rights) and *CyberGaeco*, the cybercrime unit of the State of São Paulo's Prosecutor's Office.

On the legislative and policy fronts, the National Intellectual Property Strategy (ENPI) has been approved and serves as general guidance for all public initiatives concerning intellectual property (IP). Additionally, the National Plan Against Piracy (PNCP) has been in force since the beginning of 2022 and serves as general guidance for all the public initiatives concerning intellectual property infringement up to 2025. IIPA urges Brazil to provide more resources to the National Council Against Piracy to implement the PNCP, primarily focusing on Copyright Act Reform and fast-tracking discussions at both the Brazilian Regulatory Agency for Telecommunications (ANATEL) and the Brazilian Film Agency (ANCINE) to implement an effective system to tackle online piracy. Also, a new Copyright Act, if one is to be developed, should provide strong copyright protection in line with international best practices, the full set of exclusive rights including the right of making available, as well as properly calibrated limitations and exceptions in accordance with the Berne three-step copyright test.

Regarding market access barriers, 2022 showed signs that Brazil would at last implement significant reductions of the industrial product tax (IPI) for video game consoles and accessories. Unfortunately, the tax burden on these products remains significant, and IIPA encourages Brazil to further reduce or eliminate IPI and other taxes. What limited reductions the government made to the IPI in 2022 were ultimately revoked, and there are rumors that the new government could prolong or worsen burdensome taxes on the industry. IIPA continues to be deeply concerned over film, streaming, and television quotas. Additionally, discussions about over-the-top (OTT) regulation and taxation, as well as digital services taxes (DSTs), are also of great concern. IIPA respectfully requests USTR to continue to encourage Brazil to pursue legislation, policies, and practices that enable a sustainable and thriving creative sector.

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<sup>1</sup> For more details on Brazil's Special 301 history, see previous years' reports at <https://iipa.org/reports/reports-by-country/>. For the history of Brazil's Special 301 placement, see <https://www.iipa.org/files/uploads/2023/01/2023APPENDIXBSPEC301-1.pdf>.

## **PRIORITY ACTIONS REQUESTED IN 2023**

### **Enforcement**

- Continue to establish a clear structure, with a high degree of political backing and adequate funding, to build on the success of Operation 404's multiple waves, *CyberGaeco's* actions, and similar operations, and ensure that law enforcement agents and prosecutors all over the country are properly trained and coordinated to conduct complex online investigations, including technical training on technological protection measures (TPMs) and anti-circumvention thereof.
- Ensure that ANCINE and ANATEL continue working to implement a system for administrative and judicial site-blocking for pirate sites.
- Encourage state courts to assign specialized courts or judges to handle IP cases (as is done with the business courts in Rio and São Paulo).
- Ensure that the *Conselho Nacional de Combate à Pirataria* (CNCP) continues to have the resources and political support to engage in cross-industry efforts against online piracy.
- Ensure that the National Plan Against Piracy speeds up discussions on a Copyright Act reform (see below), as well as on related site-blocking initiatives.
- Implement a long-term national program to train judges and prosecutors on IP law, the WIPO Internet Treaties, and enforcement measures, including procedures on site-blocking legal actions as well as technical training on TPMs and anti-circumvention; adopt judicial policies that expedite criminal copyright investigations across state jurisdictions; and reform sentencing practices to achieve deterrent impact.
- Implement better border controls against the importation of counterfeit video game hardware, piracy devices (PDs), modified consoles, and circumvention devices.
- Encourage regional Federal Revenue enforcement units (DIREPs) to maintain anti-counterfeiting raid actions in the so-called secondary zones (in the local market).
- Ensure that ANCINE continues to actively fulfill its duty in the fight against piracy of audiovisual content in Brazil.

### **Legislation and Regulation**

- Ratify and implement the WIPO Internet Treaties.
- Ensure the Copyright Law, currently under review, or any legislation on copyright:
  - (i) Fully implements the WIPO Internet Treaties, in particular the exclusive making available right, without conflating it with communication to the public right ("public performance" right as it is described in current Brazilian law) and clarifying that interactive streaming services are outside of the Central Bureau for Collection and Distribution's (ECAD's) statutory default mandate; the anticircumvention of TPMs; and penalties for trafficking in circumvention devices and software;
  - (ii) Removes the default rule whereby authors', performers', and sound recording producers' communication to the public rights (broadcasting and public performance) are collectively managed by ECAD, or at the very least introduces adequate governance rules for ECAD, including fair and balanced representation of rights holders in ECAD's governing bodies and adequate distribution rules of the revenue collected.
  - (iii) Provides express legal basis and a streamlined process for civil and criminal courts to continue issuing orders to Internet service providers (ISPs) to block access to websites dedicated to copyright infringement;
  - (iv) Covers intermediary liability for inducing or encouraging infringement under certain circumstances, including advertisements placed on pirate sites;
  - (v) Criminalizes signal theft in the Pay-TV and OTT sectors;
  - (vi) Implements special cybercrime courts and prosecution units;
  - (vii) Penalizes repeat infringers, including those identified on online platforms and Internet applications and has ISPs define clear and effective policies to deal with such matters;
  - (viii) Ensures that any exceptions and limitations comply with the three-step test; and

- (ix) Ensures the availability of meaningful compensation for infringement commensurate with the harm suffered and at a level that will deter future infringements.
- Follow through with revision of the Customs Law to clarify that the retention of counterfeit or any other illegal product by customs authorities does not require a court's order to be confirmed.
- Approve draft bills intending to implement a judicial site-blocking system.

### Market Access

- Enable industry growth by reducing high tariffs and taxes placed on video game products.
- Mitigate imposition of the “video-on-demand (VOD) tax,” DST, or similar tax on movies and TV programming delivered on demand; and eliminate audiovisual quotas that discriminate against non-Brazilian content.
- Exempt OTT services from compliance with the existing Pay-TV Law, consequently, not increasing burdens towards either service, as a way to correct potential asymmetries.
- Reaffirm that collective management organizations (CMOs) can assert rights to collect royalties for acts of communication to the public only where authors and performers in audiovisual works have specifically mandated that these CMOs do so, and only where relevant rights have not already been assigned to producers of audiovisual works.
- To not renew Pay-TV Content Quotas, because their renewal artificially constrains access to Brazilian market of U.S. content exports and forces U.S. companies to make content spending decisions that would not be driven by the marketplace.

## THE COPYRIGHT MARKETPLACE IN BRAZIL

**Online marketplace:** Internet access and demand for online content continue to grow in Brazil. In 2022, at least 62 online platforms offered legal viewing options to Brazilian television and film audiences.<sup>2</sup> Most Pay-TV operators also provide TV everywhere services, allowing subscribers to access authenticated content across multiple platforms. Online access in Brazil to legitimate video game play is available through Xbox Live, Nintendo eShop, and PlayStation Network. Streaming accounted for 85.6% of revenues in Brazil for the music industry, representing a 34.6% revenue growth in 2021.<sup>3</sup> Combined ad-supported video and ad-supported audio streaming recorded growth of 46.3%.<sup>4</sup> Finally, in 2021, Brazil recorded revenues of more than US\$300 million for the first time ever.<sup>5</sup>

Despite this abundance of legal offerings, the ubiquity, variety, and adaptability of piracy distribution channels — including infringing sites, devices, hard goods, and camcording — continue to inhibit the development of a healthy legitimate online marketplace in Brazil. A study published in early 2022 showed that Brazil was the fifth country in the world ranking for online piracy consumption, with over 5 billion visits to websites that offer illicit content.<sup>6</sup> The music industry has not yet achieved the market turnover results that it had in Brazil in the mid-1990s, in the pre-digital era, when Brazil was the world's sixth largest music market. Since then, per capita music revenue in Brazil has fallen from US\$8.50 in 1997 to US\$1.82 in 2021 in large part due to the rise of online piracy.<sup>7</sup> For 2021 and 2022, the scale of the piracy landscape in Brazil remained critical and, despite shifts in distribution channels and some declines, largely unchanged.

**Infringing Linking Sites, Stream-Ripping Sites, Stream-Manipulation Sites, Cyberlockers, and BitTorrent:** The four most popular types of online distribution channels for infringing materials in Brazil are: (i) websites targeted to the Brazilian market that link to infringing distribution hubs (including “cyberlocker” services and linking

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<sup>2</sup> According to a BB Media report, for more details see <https://www.telesintese.com.br/ha-62-plataformas-de-streaming-em-operacao-no-brasil/>.

<sup>3</sup> International Federation of the Phonographic Industry (IFPI), 2022 *Global Music Report*, p. 138.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> Study by Akamai and MUSO, for more details see <https://static.poder360.com.br/2022/03/soti-security-pirates-in-the-outfield.pdf>.

<sup>7</sup> Id.

sites); (ii) file sharing via illicit peer-to-peer (P2P)<sup>8</sup> networks and indexing sites for torrent files; (iii) stream-ripping sites that circumvent TPMs on licensed streaming sites, such as YouTube; and (iv) illicit streaming devices (ISDs), which use some of the previously listed pirate technologies to deliver non-authorized content to households where they are set up.

Online piracy based on linking sites remains dominant. Infringing sites dedicated to one specific type of content, such as those sites solely dedicated to video games, tend to attract audiences faster and remain popular. This includes the highly popular Portuguese-language site, *yuzuroms.ml*, for infringing Nintendo Switch titles. These websites rely on magnet torrent links and “sister domains” (sites that have the same look and feel as the original target site and are registered to the same operator but have no illegal content). “Sister domains” are increasingly used exclusively for payments that allow purveyors of illegal content to protect their revenue stream. Overall, the infringement ecosystem is now fragmented with multiple small new infringing sites competing for the Brazilian audience. Online piracy likewise continues to plague the publishing industry. Several sites trafficking in infringing copies of books (*mercadolivre.com.br*), as well as journal articles (*sci-hub*),<sup>9</sup> remain problematic for publishers. There were, however, some positive developments for the industry in 2022, with raids carried out by law enforcement against operators of online sites trafficking in infringing copies of books in the States of Paraná, Espírito Santo, Maranhão, and Minas Gerais.<sup>10</sup>

The video game industry reports that Brazil ranks third globally in P2P piracy with a tremendous increase in volume of active illegal game websites being monitored in the country. For linking sites dedicated to unauthorized download of game titles, there was an overall increase of 21% in the number of illegal sites and potential targets for action, and there are more illegal sites dedicated to multiple types of content (including movies, TV series, and music). The volume of infringing game titles and product listings available on e-marketplaces has remained steady in general terms. Although some ESA members continued to see an increase in cyberlocker and BitTorrent network activity when it comes to certain popular game titles, in 2022 the video game industry overall saw a 5.2% decline in cyberlocker activity and a 21% decline for BitTorrent, in a year-on-year comparison, according to SimilarWeb and *IknowWhatYouDownload.com* data. Warnings of virus and malware risks within the online piracy communities could be one explanation for the shift from cyberlockers and BitTorrents to website-based piracy. Video game titles are the second most popular type of content among torrent downloads in Brazil, and the top 10 most popular titles are all from ESA member companies. While most cyberlockers and linking websites are hosted and have their domain names registered outside Brazil, they clearly target the Brazilian market. Many rely on social media profiles in Portuguese to promote user engagement and appear to have local operators and intermediaries (such as advertising providers and payment processors) for monetization channels. Many Brazilian sites also employ unique methods for undermining anti-piracy efforts, such as the use of local encryption and “captcha” technology to prevent rights holders from detecting links to infringing files through automated monitoring.

Online video game piracy has increased in volume of sources (unique targets) and its combined audience, resulting in a worsened overall scenario. This year both indicators (audience and number of unique targets) increased on a faster pace than in the previous year. Another problem the industry faces is unauthorized digital goods (UDGs)<sup>11</sup> (infringing versions of digital assets available within a video game environment, such as virtual currencies, digital

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<sup>8</sup> See the TruOptik study summarized in IIPA’s 2016 Special 301 submission, at p. 67, available at <https://iipa.org/files/uploads/2017/12/2016SPEC301BRAZIL.pdf> (“IIPA 2016”), documenting higher levels of “unmonetized demand” in Brazil than in almost any other market, regardless of population or level of Internet penetration.

<sup>9</sup> According to the site, Brazil ranks among the top five countries with the highest download activity.

<sup>10</sup> See [Download ilegal de livros é alvo de operação em quatro estados | Metrôpoles - Metrôpoles \(ampproject.org\)](#).

<sup>11</sup> Unauthorized Digital Goods (UDGs) are unauthorized sales of in-game digital items. They have become a growing concern for the video game industry. Closely related to these in-game items are software products (collectively known as “cheat software”) that enable the unfair and rapid collection and aggregation of virtual goods, such as bots, hacks, and “cheats,” or which otherwise tilt the scales in favor of one player over another. The rise of UDGs and cheat software negatively impact video game companies and consumers in the following ways: (1) sellers of UDGs and cheat software divert significant revenue away from video game developers and publishers; (2) sales of digitally delivered items, like in-game digital items, have the potential for consumer fraud (such as stolen payment methods or compromised accounts) and the facilitation of money laundering schemes; (3) the unchecked sales of cheat software can threaten the integrity of game play, alienating and frustrating legitimate players; and (4) video game publishers and developers are forced into a perpetual virtual “arms race” to update their products and security technology before the sellers can update theirs.

accounts, or “skins”). Dedicated commercial UDG pirates have professionalized and expanded their activities. Data gathered from SemRush and Google searches indicates that *MercadoLivre.com.br* is still the most popular platform for UDGs followed by *Americanas.com* in volume of listings with these characteristics. Both of these marketplaces are very responsive to publishers’ brand protection programs, with take down rates of over 90% for certain rights holders. However, rights holders carry a heavy burden to enforce against ads for infringing material posted by users. *MercadoLivre*, encouragingly, is beginning proactive enforcement efforts in 2023 and has reached out to video game publishers for rights information. Meanwhile, other online marketplace platforms such as *olx.com.br* and *shopee.com.br* have lower compliance rates in Brazil.

According to the International Federation of the Phonographic Industry’s (IFPI’s) Music Consumer Study for 2022 (MCS), the music piracy rate in Brazil stood at 52% of all internet users in 2021 – one of the highest in the world. Fifty-one percent of users engaged in stream ripping using websites or mobile apps (60% of 16- to 24-year-olds) while 30% used cyberlockers to download pirated music. Cyberlockers such as *4Shared* (3.5 million visits from Brazil in the third quarter of 2022) and *Zippyshare* (4.1 million visits in the same period) are also well-known destinations in Brazil for pirated music.

**Piracy Devices (PDs) and Signal Theft:** In 2022, Brazil continued to see significant levels of online piracy, piracy apps, and piracy devices harming the local audiovisual market. Signal theft remains an issue in Brazil, especially in poorer communities and is used as a source of premium live content for online piracy and ISDs’ businesses. In this regard, the use of devices known as “TV Boxes,” which can be preconfigured to steal protected content, is a growing and worrisome reality in the country. A significant amount of piracy devices is sold on the Internet, mainly in online marketplaces. Brazil’s economic crisis of recent years combined with the COVID-19 pandemic have set the stage for a likely spike in Internet protocol television (IPTV) rogue devices and pirate live-streaming of news and sports in coming years. Brazilian enforcement authorities have deployed strong efforts to properly tackle these issues in 2022, mainly through ANATEL, ANCINE, Customs, and the Ministry of Justice, although the remarkably high levels of audiovisual piracy in the region mean that, even with these actions resulting in a substantial impact in the number of infractions, the problem remains significant.

**Hard Goods Piracy:** Even though Internet piracy is growing faster than physical piracy in Brazil, online products demand high bandwidth, so strong demand persists for pirate physical copies that can be accessed and enjoyed offline. For the audiovisual sector, the prevalence of pirate DVDs and other disc-based products is declining slowly but remains significant. The HTV box and other piracy devices have also entered the hard goods piracy market. In the case of video games, hard goods piracy takes several forms in both online and street markets: (i) pre-loaded devices (e.g., hard drives), discs, and memory cards that are locally burned and assembled with illegal copies of video games; (ii) circumvention devices as mentioned above; and (iii) modified consoles. While some of this infringing product enters the Brazilian market through the nation’s relatively porous borders and ports, it is becoming more common for content from torrent sites to be burned onto imported blank media in small, decentralized burner facilities, often located in private homes. Apart from some noteworthy enforcement actions, described below, the lack of criminal investigations and effective action for seizures of modified consoles or circumvention devices or against repeat infringers enable these businesses to continue to thrive.

**Camcording:** Camcording piracy has been a persistent problem in Brazil but had been trending down pre-pandemic. Camcording halted between 2020 and 2021, due to COVID-19-related restrictions, but is expected to resume its previous levels with the reopening of movie theaters.

## **COPYRIGHT ENFORCEMENT IN BRAZIL**

**Enforcement Against Online Piracy:** The lower level of compliance by online platforms to tackle infringing uses and repeat infringers, as well as slow takedown processes, facilitate widespread commercial piracy in Brazil. While there are no copyright safe harbors in Brazil, there are existing voluntary notice and takedown efforts to combat

piracy online. However, the *Marco Civil da Internet* (Brazilian Internet Law) continues to create problems for rights holders as it is unclear whether the law applies to copyright enforcement online, consequently creating reluctance on the part of online intermediaries and law enforcement to act. The “Marco Civil” statute was passed in Brazil in 2014, and since copyright is excluded from the scope of application of this law, the government should ensure that its implementation does not interfere with existing voluntary notice and takedown efforts or other constructive cooperation to combat piracy online. Additionally, the lack of deterrent penalties applied to copyright infringement also contributes to the widespread piracy problem. However, the Brazilian campaign against online piracy performed well at both federal and state levels during 2022.

**Operation 404 and Operation Brick:** A positive note on enforcement efforts in Brazil includes the fourth wave of Operation 404 against online content piracy, which was executed by the Brazilian Ministry of Justice and Public Safety (with the support of the cybercrime team (CIBERLAB), enforcement authorities from ANCINE, stakeholders from the private sector (Brazilian Pay-TV Association (ABTA), Alianza, and the Motion Picture Association (MPA)), and international anti-piracy groups and law enforcement (U.S. Department of Justice, the UK Intellectual Property Office, and City of London Police)) in June 2022 and December 2022. Thirty search and seizure warrants were served in 11 Brazilian states, and 226 websites and 461 illegal apps were blocked pursuant to a criminal court order. All of the apps combined had been downloaded more than 10.2 million times. Social media accounts, pages, and search results related to the targets were also delisted. The latest operation is tackling online piracy in general, including criminal cases related to video games and targeting UDG commercial sites.

One of the new aspects of this year’s Operation was the suspension of abusive video game users for 30 days from the metaverse platform where they engaged in copyright infringement. These users are dedicated to building digital items called “maps” that use music without the requisite authorization from the right holders. The “maps” are virtual concert stages where unlicensed music is performed without authorization. These “maps” and the music files are distributed to users via downloadable links and are also used in “events” promoted by users.

In addition to these operations, the São Paulo Prosecutor’s Office special unit *CyberGaeco* led a series of criminal investigations against eight major infringing sites dedicated to video game piracy in Brazil also expanding its actions to UDG commercial Brazilian websites on a strategic improvement against online game piracy. These illegal game sites combined more than 840 thousand monthly visits.

**Shutdown of Various Stream Manipulation Services:** Following a coordinated approach involving Pro-Musica Brasil, Brazilian anti-piracy body APDIF, and the Brazilian police, the operator of *turbosocial.com.br* and six affiliated sites ceased offering streaming manipulation services. A further coordinated action by APDIF and Pro-Musica Brasil, by way of cease-and-desist letters, resulted in seven additional websites ceasing to offer music stream manipulation services. In addition, IFPI, Pro-Musica Brasil, and APDIF worked with *CyberGaeco* on an action that resulted in 18 websites and five users of a popular online marketplace ceasing to offer stream manipulation services. An additional 12 websites voluntarily stopped offering streaming manipulation services as a result of this action. In total, more than 65 streaming manipulation services have been affected by this coordinated action in Brazil and an additional 35 listings for music streaming manipulation services have been removed from a popular e-commerce platform.

**Domain Seizures:** In recent years, there have been significant positive developments in the area of domain seizures in Brazil. The domains for 10 infringing music sites were recently either suspended or seized, and the operators paid financial penalties that *CyberGaeco* donated to social work organizations.

**Seizure of Illicit Streaming Devices (ISDs):** The Federal Regulatory Agencies ANATEL (telco) and ANCINE (content) worked with the Brazilian Customs to seize more than 200,000 ISDs at Brazilian ports of entry from October 2021 to October 2022, which meant US\$35 million in losses for pirates. However, these agencies suffer from a lack of resources and staff. IIPA urges the Government of Brazil to make ANATEL a consenting body within the Brazilian

Foreign Trade System (SISCOMEX) so the Agency can enhance its role to prevent ISDs from even leaving their exportation ports.

Although anti-counterfeiting raid operations were affected by the general strike of the Federal Revenue in the first quarter of 2022 and the reduced political engagement due to the electoral year, many operations were conducted targeting the seizure of illegal devices in 2022. The video game industry supported numerous training sessions in Brazil in 2022, some that resulted in subsequent raids. For example, following a training for the State Police Department from Minas Gerais, the department was able to conduct a raid action of over 1,000 counterfeit video game products. In December, following training of the Customs Authorities from the Port of Santos (State of São Paulo), the authorities seized over 5,000 mini-consoles with pre-loaded infringing games. One video game company reported that actions by Brazilian customs and police raids in popular markets throughout Brazil resulted in the seizure of 50,600 preloaded consoles with unauthorized video games in 2022.

These enforcement actions speak to Brazil's improvement. However, too much of Brazil's judicial system continues to lack adequate understanding of IP matters, though some exceptions exist, such as the specialized commercial and criminal courts in São Paulo (see above) and Rio de Janeiro. IIPA urges Brazil to commit sufficient resources and political will to train its police, judges, and prosecutors in best practices to effectively address the country's rampant piracy problem, as well as technical training in complex online piracy, TPMs, and anti-circumvention technologies.

Even though there have been positive advancements in the last few years, especially with Operation 404, Brazil still suffers from a lack of specific norms and regulations regarding the enforcement of copyrighted works over the Internet and a lack of resources and staff to support enforcement actions considering the reach and amount of content piracy in the region. IIPA encourages CNCP to build on its 2022 work, develop a strategic plan to give top priority to combating widespread online enterprises dedicated to copyright infringement, and engage all rights holders and other players in the Internet ecosystem (including ISPs, hosting providers, domain name registrars, search engines, advertising networks, payment providers, etc.) to develop better standards and effective voluntary agreements to fight online piracy. To effectively undertake these actions, the Brazilian government should adequately fund the CNCP and increase the CNCP capability to operate with more human resources and infrastructure.

**Case Developments:** In *Intervozes v. Google Brasil*, the São Paulo State Court of Justice ruled that Google Brasil (YouTube) cannot take down audiovisual content infringing third parties' rights (and duly reported by the rights holder using YouTube's Content ID) without a previous court order pursuant to the Brazilian Internet Law and the freedom of speech provision in the Brazilian Constitution. This ruling may have negative effects on automated content protection tools used by Internet applications and risks deeply affecting enforcement of copyright on the Internet, as well as infringement numbers in Brazil if higher courts uphold the decision. However, it is important to remark that this case in particular was not about copyright specifically (and the video in question was about human rights issues) – therefore, it is not clear if the courts would have the same exact understanding when it comes to copyright issues.

On August 10, 2021, the Tribunal of Justice of the State of São Paulo, issued a permanent blocking order against 14 stream-ripping sites in a criminal case initiated by the industry's anti-piracy body, APDIF. The decision is the first of its kind in Brazil against music piracy services and affirms the legal powers of Brazilian courts to order permanent injunctions in cases against foreign sites with a significant audience in Brazil. The decision is part of the campaign developed by APDIF and *CyberGaeco*. More recently, in August 2022, the Tribunal of Justice of the State of São Paulo granted a permanent and dynamic blocking injunction against 21 major stream-ripping services, and in September 2022, the same court granted a dynamic blocking injunction against 40 major stream-ripping services for an initial period of 180 days. Both orders were issued following applications filed by APDIF and *CyberGaeco*.

**Enforcement Cooperation:** Audiovisual industry stakeholders play an active role in the Ministry of Justice's National Council Against Piracy, with regular participation by the MPA and the ABTA. MPA became a board member in December 2022, while the ABTA already serves on the Council. MPA was recently chosen to participate in the

Ministry of Economy's Intellectual Property Group (GIPI), which is responsible for discussing and updating Brazil's national strategy for IP. MPA and the ABTA are members of ANCINE's Technical Chamber to Combat Piracy, and both trade associations are part of a Technical Cooperation Agreement with the Public Prosecutor's Office from São Paulo State, aiming at tackling online piracy primarily through site-blocking judicial actions.

Additionally, there were multiple events to address online infringements, including three hybrid events dedicated to discussing with state prosecutors the application of disruptive actions against online piracy and cyber criminals. These events took place in the cities of Belo Horizonte, Porto Alegre, and Santa Catarina, and they also included an online training on open-source investigations with classes on different subjects and counting more than 33 hours of information.

In mid-August 2022, the National Secretary of Copyright and Intellectual Property (SDAPI) of the Ministry of Tourism, announced a series of public consultation meetings, starting in September and focused on different issues related to the use of creative content in the online environment. The first of these virtual meetings was focused on "streaming as a way of public performance." These "forums" will continue until the end of the year, and it is not clear if any conclusions or recommendations will be generated on every topic discussed. Additionally, there is no indication if these meetings will continue. Pro Musica Brasil attended the first session on behalf of the recording industry and ratified the position of the industry that ECAD has no jurisdiction nor legal powers in relation to interactive streaming.

**ANCINE's Anti-Piracy Program:** In December 2022, Ancine's board of directors has decided to completely redraft its Anti-Piracy Program, which will now be called Copyright Protection Program. In this context, the cooperation agreements that the Agency had with the MPA and with other players, such as the ABTA and e-commerce platforms, were terminated. Additionally, the Anti-Piracy Technical Chamber was dissolved, with the promise of setting up a Technical Chamber on Copyright Protection in the future. IIPA fears that these changes, under the pretext of reformulating anti-piracy programs, will undermine the various advancements that have been achieved in this area in recent years.

## **LEGISLATION AND REGULATION IN BRAZIL**

**Adopted Legislation:** On December 16, 2021, Brazil adopted Legislative Decree # 37/2021, which ratified the Budapest Convention. The ratification should facilitate cooperation between Brazil and other countries to fight cybercrime.

**National Intellectual Property Strategy:** In July 2020, Brazil's Economy Ministry launched a new consultation period to seek input on its proposal for a National Intellectual Property Strategy (ENPI), which was developed by the Inter-ministerial IP Group (GIPI) (overseen by the Economy Ministry). In late 2021, the ENPI was approved and made official by Presidential Decree, and Brazil's Ministry of Justice and Public Security launched the official PNCP in early 2022, as part of the aforementioned ENPI.

IIPA supports many of the strategy's goals, such as promoting the creation and strengthening of specialized IP public agency units and personnel, ranging from the judiciary to the police and customs; strengthening the structures of public policies against piracy that are already in place within the Ministry of Justice and Public Safety and other public agencies; re-affirmation of the authority of the administrative sphere to guarantee IP rights, including the opening of investigations and the suspension of websites and other services used primarily to violate IP rights; and in terms of the ENPI's general guidelines, increasing society's awareness not only of the benefits of IP rights, but also of the losses caused by the violation of IP rights, among others.

One of the strategy's goals is to draft a bill to reform the Copyright Law (LDA) taking into account new technologies and business models on the Internet. Several bills are working their way through the legislature related to notice and takedown, ISP safe harbors, and user-generated content platforms. Additionally, the bill enabling site



blocking has made no progress for the third year in a row. IIPA urges Brazil to focus on Copyright Act reform and the implementation of a site-blocking system. Moreover, discussions on site-blocking at both ANATEL and ANCINE should be fast-tracked to implement an effective system to tackle online piracy. The agencies are currently working on a cooperation agreement regarding the issue. In late 2022, ANATEL representatives traveled to Portugal and Spain to learn from local authorities about their successful site-blocking programs.

It is also essential for Brazil to ratify and implement the WCT and implement the WPPT to foster a vibrant legitimate market for Brazilian and foreign content. IIPA urges the Government of Brazil to consult with rights holders on the proposed copyright reform and ensures that it does not over-regulate or create broad exceptions and limitations to copyright. IIPA makes the following recommendations for the potential new law:

- Amend Article 105 to confirm that: (1) injunctions, including catalogue-wide injunctions where applicable, are available against all types of copyright infringement, circumvention of TPMs, and dealing in circumvention devices, circumvention software and/or components including installation and modification; and (2) injunction recipients bear the burden of ascertaining what they must do to avoid infringement.
- Amend Article 107, which covers TPMs, to encompass all forms of access and copy control technologies as well as dealing in circumvention devices and to include deterrent sanctions and penalties for the violations of TPMs.
- Clarify the provisions on damages to ensure that deterrent-level damages and a choice of method to calculate damages are available in respect of copyright infringement and circumvention of TPMs. Article 103 of the Copyright Law should be amended to expressly allow rights holders to choose the method of calculation of damages and include damage/losses suffered, an account of the infringer's profits, and a reasonable royalty as methods of the calculation of damages.
- Amend Articles 98 and 99, which govern Brazil's collective management of broadcast and public performance rights for authors, performers, and sound recording producers, to reflect international best practices. The law should, at a minimum, enable rights holders to: (1) determine whether to license their rights individually or collectively, which should be a voluntary decision; and (2) if they so choose, become direct members of the ECAD, a private umbrella CMO, and enjoy fair and balanced representation on its governing bodies. Brazilian authorities should also seize this opportunity to urge ECAD to amend its fixed split of the revenue collected from the single tariff, to the considerable disadvantage of producers. For example, music producers receive only 13.8% of total distributions despite their significant investments. Article 99(1) of the Copyright Law (introduced in law in 2013), which provides for a "one right holder one vote" rule within ECAD, should also be amended. This is not in line with international good practices and does not ensure that all rights holders whose rights are managed by ECAD are guaranteed fair and balanced representation in ECAD's governing bodies.
- Clarify that interactive streaming involves acts that fall within producers' exclusive distribution right, including the making available right arising from the WCT and WPPT. As previously reported, this issue has concerned the music industry since the 2017 decision in *ECAD v. Oi FM* where the Superior Tribunal Court (STJ, *Superior Tribunal de Justiça*) erroneously ruled that both interactive and non-interactive streaming involved the public performance right and therefore, fell under ECAD's collective management mandate. The new law should include sound recording producers' separate, exclusive right of making available to the public as established in Article 14 of the WPPT. In the alternative, the new law should expressly indicate that interactive uses of sound recordings fall under Article 93(II) of the existing law rather than under the public performance right. Finally, the exclusive right of making available should be enshrined in Brazil's copyright law, for both sound recordings and audiovisual works, consistent with obligations under both WCT and WPPT.
- Cover intermediary liability for inducing or encouraging infringement under certain circumstances, including advertisements placed on pirate sites.
- Criminalize signal theft in the Pay-TV and OTT sectors.
- Implement special cybercrime courts and prosecution units.
- Penalize repeat infringers, including those identified on online platforms and Internet applications, and have ISPs define clear and effective policies to deal with such matters.
- Ensure that any exceptions and limitations comply with the three-step test.

- With respect to copyright infringement, ensure the availability of meaningful rights holder compensation that is commensurate with the harm suffered by the rights holder and at a level that will deter future infringements.

In addition to amendments to strengthen protection and enforcement for rights holders, Brazil is currently considering several bills with worrisome provisions, including amendments to the Copyright Act.

**Derogation of Incentives:** At the same time that conversations on Pay-TV and screen quotas renewals are taking place (see below), the government has presented bills to revoke existing incentives that aid in the compliance with these quotas. These incentives create tax benefits for international programmers, which local players can access to co-produce works that are compliant with quotas. House Bill 4367/2020, currently awaiting the creation of a Special Committee, would do away with tax incentives contained in the Audiovisual Law. This bill follows similar efforts by the Ministry of Economy to revoke these incentives. These initiatives, if they pass, would generate significant losses for local producers and for their international coproduction partners.

**Voluntary Agreements and Best Practices Guides:** Several voluntary agreements and best practices guides have been signed between companies and public entities in Brazil, namely the “Memorandum of Understanding on Online Advertising and Intellectual Property Rights” (2019) and the “Best Practices Guide for Online Payment Processors” (2020) that aim to establish internal policies to reduce digital advertising and income from intellectual property infringement. Unfortunately, the lack of enforcement powers by CNCP is a strong impediment on establishing a cooperative environment among stakeholders. Government engagement to promote cooperation among private sector players and between public and private organizations through the CNCP could improve participation in voluntary measures.

## **MARKET ACCESS AND RELATED ISSUES IN BRAZIL**

**Pay-TV Content Quotas:** Effective in September 2011, Law 12.485/2011 imposes local content quotas for Pay-TV, requiring every qualified channel (those airing films, series, and documentaries) to air at least 3.5 hours per week of Brazilian programming during primetime. The Law also requires that half of the content originate from independent local producers and that one-third of all qualified channels included in any Pay-TV package must be Brazilian. Implementing regulations limit eligibility for these quotas to works in which local producers are the majority IP rights owners, even where such works are co-productions, and regardless of the amount invested by non-Brazilian parties. These quotas are set to expire in September 2023 but could be renewed. Lawsuits challenging the constitutionality of these local content quotas and the powers granted to ANCINE are pending before Brazil’s Supreme Court.

**Screen Quotas:** The most recent Presidential Decree on Screen Quotas, released in January 2020, imposed quotas for 2020 that were similar to prior years, requiring varying days of screening depending on the number of screens in an exhibitor group. For example, an exhibitor group with 201 or more screens is required to meet a 57-day quota, and all the screens in the exhibitor group’s complexes must individually meet this quota. While these quotas expired in September 2021, there is a draft bill (5092/2020) seeking to extinguish any deadline applied to the theatrical quotas. Local content quotas limit consumer choice and can push consumers toward illegitimate content sources.

**Video-on-Demand (VOD) Tax and Regulatory Framework:** Brazil currently applies a Condecine tax, on a per-title basis, to films, Pay-TV, and “other segments,” according to ANCINE’s Normative Ruling #105. If imposed on the VOD segment, such a tax would chill investment and curb consumer choice. Helpfully, in September 2021, Brazil’s legislature voted against the levy of Condecine tax over VOD content on a per-title basis, overriding an executive branch veto in the process. Although there is not currently a Condecine tax over VOD, discussions within the legislature persist. Notwithstanding recent positive developments in this area, industry stakeholders committed to the growth of Brazil’s OTT market remain concerned about the future.

**High Tariffs, Taxes, and Barriers on Entertainment Software:** Brazil's high tariffs and taxes on video game products and entertainment software are a long-standing concern and remain so going into 2023. In August 2022, then-President Bolsonaro reversed reductions of IPI that had been applied earlier in the year for over 100 products, including video game consoles, whose rate now have returned to the burdensome level of 20%. The August presidential decree sought to implement a decision of the Supreme Court, which questioned the constitutionality of IPI reductions that might adversely affect the free zone of Manaus (ZFM), where the IPI does not apply. In fact, it has not been shown that any ZFM manufacturers produce any video game related products that might be disadvantaged by a reduction in the IPI in the rest of the country.

On June 21, 2022, the Foreign Trade Chamber (CAMEX) of the Economy Ministry announced the reduction in import (II) taxes for console accessories and portable video game devices. Going into effect in July 2022, the move represented important progress to reduce the import tax burden on games with embedded screens to zero, and for other consoles and peripherals and accessories, it was reduced from 16% to 12%. These taxes act as a significant barrier to legitimate market entry, as an incentive for the proliferation of infringing games, and as an obstacle to the growth of a legitimate video game industry.

Under a 2013 interpretation of the law that considered customized software a service, tariffs and taxes began to be calculated based on the imputed "copyright value" of a video game title itself (i.e., the distribution and marketing fees paid to the copyright holder), rather than on the much lower value of the import medium, which continued to be applied to off-the-shelf, physical software. However, the taxation of off-the-shelf software, such as video games, is widespread, including the federal IPI, import tariff (II), federal social contributions (PIS and COFINS), and the municipal services tax (ISS). The overall heavy tax burden on such software therefore marginalizes the legitimate market (since pirate copies, whether smuggled across the border or burned within the country, are not subject to these fees). IIPA urges the reconsideration of this problematic interpretation from 2013. The overall tax burden for video game products remains high, and IIPA encourages Brazil to continue efforts to further reduce or eliminate the federal-level IPI, import taxes, as well as the state-level (ICMS) and ISS taxes on video game consoles and accessories (the IPI on portables was fully eliminated in 2021).

**Collective Management Organizations (CMOs):** In late 2018, prior to its abolition, Brazil's then Ministry of Culture granted the accreditation of three CMOs that represent directors, screenwriters, and performers in audiovisual works. These CMOs sought to collect royalties on their behalf for the communication to the public of audiovisual works in every exploitation window, including theaters, free-to-air, Pay-TV, and digital distribution. Nevertheless, the CMOs have not taken a position as to whether they are entitled to collect royalties only if the rights that originate such collection have not been assigned to the audiovisual work's producer, which means the CMOs may still try to collect for previously assigned rights. This is patently incorrect because Brazil's copyright law establishes a voluntary collective rights management regime, which means CMOs must affirmatively prove representation of the rights holders they claim to represent rather than act based on a presumption of representation. IIPA urges the Brazilian government to continuously and officially reaffirm that CMOs can assert rights only to collect royalties for acts of communication to the public where authors and performers in audiovisual works have specifically mandated that these CMOs do so, and only where relevant rights have not already been assigned to producers of audiovisual works. This continuous clarification is necessary to ensure that the CMOs assert only properly authorized claims and to protect rights of freedom of contract for all stakeholders.